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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

WATERWORKS INDUSTRIES, INC.,

Plaintiff and Appellant,

v.

ASR CONSTRUCTORS, INC. et al.,

Defendants and Respondents.

E066839

(Super.Ct.No. INC1300420)

OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman,
Judge. Affirmed.

Law Office of Eric J. Phillips and Eric J. Phillips for Plaintiff and Appellant.

SMTD Law, Jonathan J. Dunn and Andrew C. Harris for Defendant and
Respondent Federal Insurance Company.

No appearance for Defendant and Respondent ASR Constructors, Inc.

I.

INTRODUCTION

On January 17, 2013, appellant/plaintiff/cross-defendant in interpleader, Waterworks Industries, Inc. (Waterworks), filed a public works subcontractor lawsuit against the City of Palm Desert (City) to recover the reasonable value of its labor and materials used in a public works project known as the Palm Desert Aquatics Center Project (Project). Waterworks also sued defendants and respondents, the general contractor, ASR Constructors, Inc. (ASR), and ASR's surety, Federal Insurance Company (Federal). The City in turn filed a cross-complainant in interpleader to interplead the Project funds against ASR, Federal, and Waterworks.

Waterworks appeals from the July 13, 2016, judgment of dismissal of the entire action, contending the trial court erred in (1) sustaining, without leave to amend, Federal's demurrer to causes of action to enforce Waterworks's public works stop notice and payment bond (causes of action D and E), (2) granting Federal's motion for summary adjudication of Federal's claims and defenses asserted in the complaint in interpleader, and (3) awarding Federal attorney fees and costs as the prevailing party on Waterworks's payment bond claim. Only Federal has responded to Waterworks's appeal.¹

We reject Waterworks's contentions and affirm the judgment.

¹ The City is not a party to this appeal and ASR did not file a respondent's brief.

II.

FACTUAL BACKGROUND

In September 2010, the City entered into a public works construction contract with ASR to build the Project. ASR in turn attempted to enter into a subcontract with Waterworks to perform the pool work and other miscellaneous services. Notwithstanding extensive negotiations, ASR and Waterworks never executed a written agreement. Nevertheless, Waterworks provided requested labor and materials, as directed by ASR.

Before proceeding with the public works construction Project, ASR executed a general indemnity agreement in 2003, in favor of Federal, as an express condition of Federal acting as ASR's surety on construction projects. In 2010, after Federal issued performance and payment bonds for the Project, ASR executed a second general indemnity agreement in favor of Federal. The indemnity agreements were made for the purpose of ASR indemnifying Federal from all losses and expenses in connection with all bonds executed by Federal on behalf of ASR.

In the course of the Project, from May to November 2011, Waterworks served the City with a series of stop notices,² including a fourth stop notice for \$1,456,271 in November 2011. On January 18, 2012, the City recorded a notice of completion of the Project.

In July 2012, the City, ASR, and Waterworks entered into a partial settlement agreement reducing the sum claimed in Waterworks's multiple stop notices. At that time, the City was withholding \$886,128.12 in remaining Project funds. The partial settlement agreement established procedures for putting Waterworks's stop notice enforcement actions on hold until all other subcontractors and suppliers were paid. The procedures involved two phases, the first of which permitted the City to release sufficient funds to ASR for paying the other subcontractors and suppliers that had submitted stop notices. In phase 2, after all the other claimants were paid, Waterworks was required to submit to ASR and the City an amended, reduced stop notice in an agreed upon sum (amended stop notice). The amount of the amended stop notice was intended to allow the City to not

² "Since principles of sovereign immunity do not permit liens for persons furnishing labor or supplies on public property, the Legislature has provided stop notice and payment bond remedies for collection of amounts due to such persons." (*Department of Industrial Relations v. Seaboard Surety Co.* (1996) 50 Cal.App.4th 1501, 1508; see also, regarding stop notices, Civ. Code, former §§ 3179-3214; Civ. Code, current §§ 9000-9510) and regarding statutory payment bonds, former Civ. Code, §§ 3247-3252; current Civ. Code, §§ 9550-9566). Stop notices give claimants a lien against the public entity's undisbursed construction funds. (*Department of Industrial Relations, supra*, at p. 1508.) Payment bonds create a statutory primary obligation by the surety company on all legitimate claims by laborers, materialmen, and subcontractors. The obligation is independent of the terms of any contract. (*Ibid.*; see also *Department of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411, 418-419 (*Fidelity Roof Co.*)).

only pay Waterworks, but also release additional funds to ASR for paying the subcontractors and suppliers that had not yet submitted stop notices.

In August 2012, Federal and ASR entered into a joint control and trust agreement. The agreement resulted from ASR experiencing cash flow problems. ASR requested Federal's assistance in discharging bonded obligations and issuing release bonds in connection with the Project. Federal agreed to provide assistance subject to the terms of the joint control and trust agreement. The agreement assigned to Federal the right to collect all of ASR's contract receivables and escrow account funds, including funds owed to ASR on the Project.

In conformity with the 2012 partial settlement agreement, on October 19, 2012, Waterworks served an amended stop notice, requesting payment of the agreed upon reduced stop notice amount of \$786,128.12. In turn, in accordance with the partial settlement agreement and Waterworks's amended stop notice, the City withheld \$886,128.12 in remaining Project funds. The City claimed no interest in the funds other than as to its attorney fees and costs pursuant to Code of Civil Procedure section 386.6.

Federal filed ASR's 2003 and 2010 general indemnity agreements with the California Secretary of State as UCC financing statements in November 2012 and March 2013.³ ASR executed the indemnity agreements in favor of Federal, as an express condition of Federal acting as ASR's surety on construction projects. The indemnity

³ "A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing." (Civ. Code, § 9312, subd. (a).)

agreements were made for the purpose of indemnifying Federal from all losses and expenses in connection with all bonds executed by Federal on behalf of or at the request of ASR.

In March 2013, ASR voluntarily defaulted on its obligations and assigned Federal all of its rights to any contract funds.

III.

PROCEDURAL BACKGROUND

On January 17, 2013, Waterworks filed a complaint against ASR, the City, and Federal, to enforce its amended stop notice. Waterworks's complaint included the following causes of action: (1) quantum meruit against ASR; (2) breach of oral contract against ASR; (3) breach of written contract against ASR; (4) enforcement of public works stop notice against ASR, the City, and Federal; (5) enforcement of payment bond against Federal; and (6) violation of the California Public Works Prompt Payment Act against ASR.

ASR answered the complaint. The City answered the complaint and filed a verified cross-complaint in interpleader, requesting dismissal from the action upon the City depositing with the clerk of the court the remaining \$886,128.12 in Project funds. Federal demurred to Waterworks's complaint, arguing that the claims against Federal for enforcement of public works stop notice and enforcement of payment bond were time-barred.

The parties stipulated to Federal taking its demurrer off calendar and to Waterworks filing a first amended complaint. The only cause of action against Federal alleged in the first amended complaint was a claim for enforcement of payment bonds. Federal again demurred on the same grounds as before, and the trial court sustained Federal's demurrer with leave to amend. Waterworks filed a second amended complaint, which included causes of action against Federal for enforcement of public works stop notices and enforcement of payment bonds (referred to in the second amended complaint as causes of action "D" and "E," respectively).

On September 20, 2013, ASR filed a voluntary petition for chapter 11 bankruptcy relief, and shortly thereafter filed a notice of a bankruptcy stay.

In November 2013, Federal demurred to Waterworks's second amended complaint, again on the ground both causes of action were time-barred under Code of Civil Procedure section 430.10.

On December 18, 2013, the court sustained Federal's demurrer without leave to amend, on the ground both causes of action D and E were time-barred under Civil Code sections 3086, 3184, and 3249.⁴ The court also ruled that the automatic stay imposed by ASR's pending bankruptcy did not preclude the trial court from ruling on Federal's demurrer. In addition, the court sustained Federal's objections to the opposing declaration of Waterworks's attorney, Eric J. Phillips.

⁴ Unless otherwise noted, all statutory references are to the Civil Code.

On December 18, 2013, the court heard and granted the City's motion to interplead the stop notice funds and ordered the City to deposit the withheld funds with the court, minus the City's requested attorney fees and costs. As ordered, the City deposited with the court \$867,342.82, the amount of the remaining interpled funds.

On December 20, 2013, the bankruptcy court granted ASR's unopposed motion to approve a stipulation between ASR and Federal regarding Waterworks's request for relief from the automatic bankruptcy stay. The bankruptcy court further ordered that ASR was "authorized to execute any and all documents in order to carry out the terms of the Stipulation." On December 27, 2013, Federal filed and served a notice of entry of the bankruptcy court order approving the stipulation and granting relief from the automatic stay.

After the court sustained Federal's demurrer without leave to amend, Federal remained in the action only as a cross-defendant in interpleader in the City's cross-complaint in interpleader. In July 2014, Federal filed a motion for summary adjudication of Federal's claim to the interpled funds and defense to Waterworks's conflicting claim. Federal argued that "[t]he same analysis finding [Waterworks's] claims against Federal time-barred should be applied to find [Waterworks's] claim of entitlement to the interpled funds is time-barred as well." Waterworks filed opposition. On October 23, 2014, the court granted Federal's motion for summary adjudication and sustained Federal's objections to all evidence Waterworks had submitted in support of its opposition.

On December 10, 2014, the trial court heard and granted Federal's motion for recovery of attorney fees from Waterworks. The court awarded Federal \$60,557.50 in attorney fees as the prevailing party defending against Waterworks's payment bond claim. (§ 3250.) On January 8, 2016, the bankruptcy court dismissed ASR's chapter 11 bankruptcy case. On July 13, 2016, the trial court dismissed the instant case without prejudice and entered a judgment of dismissal. On September 12, 2016, Waterworks filed a notice of appeal of the July 13, 2016, judgment of dismissal.

IV.

TIMELINESS OF APPEAL

Federal contends Waterworks's appeal is untimely because the notice of appeal was filed on September 12, 2016, more than 60 days after the litigation between Federal and Waterworks ended. Federal argues the 60-day period began running, at the latest, on February 25, 2015, when the trial court entered an order awarding Federal attorney fees against Waterworks. This was after the court sustained Federal's demurrer to the second amended complaint without leave to amend (Dec. 18, 2013), granted Federal's summary adjudication on the cross-complaint in intervention (Oct. 3, 2014), and awarded Federal attorney fees on December 10, 2014.

On December 22, 2014, Waterworks filed a notice of appeal of orders entered in favor of Federal on its demurrer, motion for summary adjudication, and motion for attorney fees. On January 28, 2015, this court sent the parties a notice stating that none of the orders were appealable. We noted in our notice that, "[w]hile a judgment that

resolves all issues between parties to litigation that continues as to others is appealable, no such judgment has yet been entered in this case.”

We further declined Waterworks’s request that this court exercise its discretion to treat the orders as appealable. “The trend of recent cases of the Courts of Appeal is to hold appellate counsel to strict account for ensuring that their appeal rights are perfected according to the applicable statutes and rules of court.” (*Jordan v. Malone* (1992) 5 Cal.App.4th 18, 22.) We therefore directed Waterworks to file within 15 days (by Feb. 12, 2015) a final judgment and a signed order granting Federal’s motion for attorney fees. This was not done. Waterworks was unable to comply with this court’s January 28, 2015, order within 15 days, because at that time there was no signed attorney fees order, order of dismissal, or final judgment. Waterworks’s lodged attorney fees order was not signed until February 25, 2015. In addition, the trial court delayed entry of judgment of dismissal of the entire case until July 13, 2016, after ASR’s bankruptcy was dismissed on January 8, 2016.

On February 13, 2015, the trial court filed and served a notice that Waterworks had abandoned its appeal (Court of Appeal case No. E062607). On February 25, 2015, the trial court entered an order granting Federal’s motion for attorney fees, previously heard and granted on December 10, 2014.

Waterworks’s first notice of appeal was premature because orders sustaining a demurrer without leave to amend, and granting summary adjudication or summary judgment are not appealable orders. (*Evans v. Dabney* (1951) 37 Cal.2d 758, 759; *Estate*

of Dito (2011) 198 Cal.App.4th 791, 799; *H.N. & Frances C. Berger Foundation v. City of Escondido* (2005) 127 Cal.App.4th 1, 6, fn. 5; Code Civ. Proc., § 904.1, subd. (a).)

Their appeal is properly taken from an order of dismissal or a judgment based on a summary judgment or summary adjudication order disposing of all claims between the parties. (*Estate of Dito, supra*, at p. 799; *H.N. & Frances C. Berger Foundation, supra*, at p. 6, fn. 5.)

Even though the February 25, 2015, order granting Federal attorney fees ended the litigation between Federal and Waterworks, the 60-day period to file an appeal did not begin running at that time because there was no final judgment as to resolution of Waterworks's claims against Federal. Waterworks timely filed the instant appeal on September 12, 2016, within 60 days after the trial court entered a final judgment on Waterworks's entire action on July 13, 2016. (Code Civ. Proc., § 904.1, subd. (a); Cal. Rules of Court, rule 8.104(a)(1).)

V.

FEDERAL'S DEMURRER

Waterworks contends the trial court erred in sustaining Federal's demurrer to the second amended complaint without leave to amend.

A. *Demurrer Standard of Review*

"A demurrer tests the sufficiency of a complaint [pleading] by raising questions of law. [Citation.] The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded. [Citation.] Where written documents are the

foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer. [Citations.] A demurrer must be sustained where the facts alleged do not entitle the plaintiffs to relief under any possible legal theory. [Citation.] Where there is no possibility amendment would cure the complaint's defects, it is appropriate to sustain the demurrer without leave to amend. [Citation.]" (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.)

This court is not bound by the trial court's construction of the complaint. Rather, this court must make its own independent interpretation. (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 20; *City of Pomona v. Superior Court*, *supra*, 89 Cal.App.4th at p. 800.) "We do not review the validity of the trial court's reasoning but only the propriety of the ruling itself." (*City of Pomona*, *supra*, at p. 801.) We therefore must affirm the trial court's ruling on the demurrer and "affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons." (*Vitkievich v. Valverde* (2012) 202 Cal.App.4th 1306, 1311.)

B. Demurrer Procedural Background

Federal demurred to causes of action D (enforcement of public works stop notice) and E (enforcement of payment bond) of Waterworks's second amended complaint. Attached to the second amended complaint were copies of the partial settlement agreement and Waterworks's amended stop notice. As to cause of action D, Federal argued in its demurrer that Waterworks could not as a matter of law enforce a public

works stop notice against a surety such as Federal. As to cause of action E, Federal argued the claim was untimely and therefore time-barred under sections 3249 and 3184.

In opposition to Federal's demurrer, Waterworks argued Federal's demurrer was improper because there was a bankruptcy stay as to claims against ASR, because of ASR's pending chapter 11 bankruptcy case. Waterworks acknowledged in its opposition that it did not intend to name Federal in cause of action D, regarding the public works stop notice. Waterworks therefore agreed to remove Federal from that cause of action. As to the timeliness of cause of action E (enforcement of payment bond), Waterworks argued ASR and the City entered into a partial settlement agreement that extended the limitation period for filing Waterworks's claims for enforcement of Waterworks's amended stop notice and payment bond. Waterworks filed a supporting declaration by Waterworks's attorney, Phillips, explaining the contracting parties' intent when executing the agreement.

After hearing oral argument on Federal's demurrer and considering the papers, pleadings, and exhibits attached to Waterworks's second amended complaint, the trial court sustained Federal's demurrer without leave to amend as to causes of action D and E. The court stated in its written order that the following was ordered:

"1. The automatic stay pursuant to 11 U.S.C. 362(a) did not preclude the Court from making a ruling on the substance of the demurrer, to the extent the demurrer sought to challenge Waterworks' right to bring a claim against Federal on the payment bond.

See, In re All Seasons Resorts, Inc. 79 B.R. 901, 904 (C.D.Cal. 1987); *In re Dunbar*, 235

B.R. 465 (9th Cir. BAP 1999) (citing *In re Lockard* (9th Cir. 1989) 884 F.2d 1171, 1177-1178; *California Civil Code* § 2806.

“2. The Court sustained Federal’s objections to the Declaration of Eric Phillips in its entirety.

“3. The Court sustained Federal’s demurrer to the causes of action for enforcement of payment bond and enforcement of stop notice as to Federal only, without leave to amend. The Court found that pursuant to California Civil Code sections 3086, 3184, 3249^[5], that the causes of action against Federal were time-barred.”

C. Phillips’s Declaration Supporting Waterworks’s Demurrer Opposition

Federal argues as a threshold matter that the trial court could not consider the Phillips declaration, which Waterworks filed in support of its demurrer opposition, when ruling on the demurrer. Phillips explained in his declaration that the intent of executing the partial settlement agreement was to extend the time for filing Waterworks’s complaint. In addition, Federal argues that Waterworks forfeited any objection to the trial court sustaining Federal’s objection to Phillips’s declaration, because Waterworks failed to affirmatively challenge the evidentiary ruling in Waterworks’s appellate opening brief. We agree on both counts.

⁵ Footnote 1 of the order is omitted here. In the footnote, the trial court noted that section 8052, subdivision (b), effective and operative July 1, 2012, provides that, notwithstanding section 8052, subdivision (a), “the effectiveness of a notice given or other action taken on a work of improvement before July 1, 2012, is governed by the applicable law in effect before July 1, 2012. . . . Accordingly, the former Civil Code sections apply to this matter.”

When deciding a demurrer, the court can only consider the facts alleged in the complaint, its attachments, and documents properly judicially noticed. (*Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184, 191.) The trial court properly sustained Federal's objection to Phillips's declaration because the declaration could not be considered by the court when deciding Federal's demurrer. The declaration could not be judicially noticed (Evid. Code, §§ 450-452) and was not included as an attachment to the complaint. Furthermore, Waterworks has not raised in its appellate opening brief any challenge to the trial court's evidentiary ruling sustaining Federal's objection to the Phillips declaration. Such objection, if any by Waterworks, is therefore deemed forfeited. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

D. Statute of Limitations

Waterworks contends the trial court erred in sustaining Federal's demurrer without leave to amend on the ground causes of action D and E were time-barred under former sections 3184 and 3249.⁶ The only cause of action actually at issue here is cause of action E (enforcement of payment bond), because Waterworks conceded in the trial court

⁶ On July 1, 2012, former section **3184** was recodified as section 9356 (stop payment notice); former section **3249** was recodified as section 9558 (payment bond); former section **3186** was recodified as 9358 (withholding of sufficient funds); and former section **3210** was recodified as section 9502 (commencement of action). The current sections are substantially the same as the former provisions and are thus "construed as a restatement and continuation thereof and not as a new enactment." (§ 8052, subd. (c).) Unless otherwise noted, all statutory references are to the former Civil Code sections in effect during the Project, which was completed before July 1, 2012. (§ 8052, subd. (b).)

that it was not going to pursue its claim alleged in cause of action D against Federal, regarding the public works stop notice. Waterworks agreed to remove Federal from cause of action D and therefore forfeited any objection to the trial court sustaining Federal's demurrer to cause of action D (enforcement of stop notice). Even assuming Waterworks continues to challenge the trial court's ruling sustaining Federal's demurrer as to both causes of action D and E, we conclude the trial court's ruling was proper, because both causes of action were time-barred under sections 3184 and 3249.

Under section 3184, any public works contractor or material supplier claiming undisbursed construction funds must serve a public entity with a stop notice within thirty days after a notice of completion is recorded.⁷ (§§ 3184, subd. (a), 3186.) The claimant contractor or material supplier must file an action on the stop notice not less than 10 days after service of the stop notice and not more than 90 days after expiration of the period in which stop notices must be served under section 3184. (§ 3210.) The claimant must file suit against a surety on a payment bond "before the expiration of six months after the period in which stop notices may be filed as provided in Section 3184."⁸ (§ 3249.)

⁷ Section 3184 provides: "To be effective, any *stop notice* pursuant to this chapter must be served before the expiration of: [¶] (a) *Thirty days after the recording of a notice of completion* (sometimes referred to in public works as a notice of acceptance) or notice of cessation, if such notice is recorded. [¶] (b) If no notice of completion or notice of cessation is recorded, 90 days after completion or cessation." (Italics added.)

⁸ Section 3249 provides: "Suit against the surety or sureties on the *payment bond* may be brought by any claimant, or his assigns, at any time after the claimant has furnished the last of the labor or materials, or both, but must be commenced before the

Thus, under the former applicable statutory scheme, a claimant must serve a stop notice within 30 days, file suit on the stop notice within 120 days, and file suit against the surety within seven months (212 days) of the date the notice of completion is recorded. If a claimant does not act within these statutory time limits, the stop notices are not perfected, the right to foreclose on the stop notices is terminated, and an action against the surety on the payment bond is time-barred. (*W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1107; *A. J. Setting Co. v. Trustees of California State University & Colleges* (1981) 119 Cal.App.3d 374, 382-383; §§ 3210, 3184, 3186.)

In this case, Waterworks alleged in its second amended complaint that the City recorded on January 18, 2012, a notice of completion of the Project. Waterworks further alleged that it served its stop notice on October 19, 2012.⁹ Under section 3184, however, Waterworks was required to serve its stop notice by February 18, 2012 (30 days after recording the notice of completion). Under sections 3210 and 3249, Waterworks was required to file its action on the stop notice by May 18, 2012 (120 days after recording the notice of completion), and file suit against Federal on the payment bond by August 18, 2012 (212 days after recording the notice of completion). Waterworks did not file its

expiration of six months after the period in which stop notices may be filed as provided in Section 3184.” (Italics added.)

⁹ The second amended complaint erroneously states the date of service as “October 19, 2013.” The typographical error is apparent from paragraph 22 of the second amended complaint, which indicates that the date of service was October 19, 2012. This is also apparent from the copy of the stop notice attached to the second amended complaint, which is dated October 19, 2012.

complaint until January 17, 2013. The facts alleged in Waterworks's second amended complaint thus establish that as a matter of law Waterworks's causes of action against Federal for enforcement of the stop notice and payment bond (causes of action D and E) were time-barred.

E. Waterworks's Attempt to Circumvent the Statute of Limitations

Waterworks argues that it successfully "pled around" Federal's statute of limitations defense. "Where the complaint's allegations or judicially noticeable facts reveal the existence of an affirmative defense, the 'plaintiff must "pled around" the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action" (*Gentry v. EBay, Inc.* (2002) 99 Cal.App.4th 816, 824.) Waterworks alleged in the second amended complaint that, "[i]n the normal course of events, [Waterworks's] time limit to commence a payment bond action would have been August 18, 2012. And while [Waterworks] did not commence its action against Federal until January 17, 2013, it did so in accordance with the relevant parties' agreed-upon procedures as set forth below."

Waterworks alleged "below" that counsel for the City, ASR, and Waterworks "developed agreed-upon procedures that would put [Waterworks's] foreclosure actions on hold until the remaining subcontractors and suppliers were paid." Waterworks further alleged that "[t]he agreed-upon procedures were memorialized in a Partial Settlement Agreement (PSA) dated July 27, 2012." Waterworks attached a copy of the partial

settlement agreement as exhibit A to the second amended complaint. Waterworks alleged that, “[d]uring the negotiations, counsel for ASR and Federal indicated that Federal also agreed to the PSA and its procedures.” Based on these allegations, Waterworks contends that the partial settlement agreement between the City, ASR, and Waterworks was binding on Federal and permitted Waterworks to disregard and extend the statutory limitation period for filing Waterworks’s claims for enforcement of the stop notice and payment bond. We disagree.

The allegations in the second amended complaint and attached partial settlement agreement fail to establish that Waterworks timely filed its claims against Federal (causes of action D and E). We reject Waterworks’s contention that the partial settlement agreement, negotiated and entered into by the City, ASR, and Waterworks, extended the statutory limitation period for filing suit against Federal for enforcement of the payment bond and stop notice. Federal was not a party to the partial settlement agreement executed in July 2012; the partial settlement agreement does not contain any terms expressly agreeing to extend Waterworks’s time to sue Federal; and Waterworks has failed to cite any persuasive authority for the proposition that Waterworks may circumvent the statutory limitation period by agreeing in the partial settlement agreement to a different period to bring its claims against Federal, when Federal was not a party to the partial settlement agreement.

Furthermore, the agreement contains an integration clause that states in relevant part: “This Agreement constitutes the entire agreement between the Parties pertaining to

its subject matter and supersedes any of the Party's prior agreements, representations, or understandings. Amendments to this Agreement are not binding unless executed in writing by all of the Parties." In addition, the partial settlement agreement expressly states that the agreement "is to be construed according to the procedural and substantive laws of the State of California," which includes the statute of limitation provisions applicable to filing Waterworks's claims alleged in causes of action D and E of the second amended complaint. (§§ 3184, 3210, 3249.)

We thus conclude the allegations in the second amended complaint and attached partial settlement agreement fail to plead around the applicable statutes of limitations. Therefore, the trial court properly sustained Federal's demurrer without leave to amend as to causes of action D and E on the ground they were time-barred.

VI.

FEDERAL'S MOTION FOR SUMMARY ADJUDICATION

Waterworks contends the trial court erred in granting, as to the complaint in interpleader, Federal's motion for summary adjudication of its claims to the interpled funds and to Federal's defenses to Waterworks's conflicting claims to the funds.

A. Procedural Background

After the trial court sustained without leave to amend Federal's demurrer to causes of action D and E of the second amended complaint, Federal filed a motion for summary adjudication as to City's cross-complaint in interpleader, which interplead \$867,342.82 in funds. Although the trial court had already sustained without leave to amend Federal's

demurrer to the cause of action for enforcement of the stop notice (cause of action D), Federal requested in its notice of motion for summary adjudication of the complaint in interpleader, that the court summarily adjudicate that cause of action D was time-barred, and that Federal was entitled to judgment as a matter of law and to receipt of the interpled funds. Federal's summary adjudication motion was supported by declarations, deposition testimony, documents, and judicially noticed pleadings, orders, and recorded documents.

Waterworks filed opposition to Federal's motion for summary adjudication, arguing that Waterworks's stop notice claim was not time-barred. Waterworks also argued Federal never acquired an enforceable right to collect the Project funds because Federal's rights to the interpled funds were derivative of ASR's rights, and ASR had no right to the funds. Waterworks argued ASR was barred from recovery of the funds under Business and Professions Code section 7031, because ASR was not duly licensed as a contractor at all times during the Project. ASR was unlicensed from June 19, 2011, to June 28, 2011.

Waterworks's response to Federal's separate statement of supporting facts conceded or did not dispute the facts, or failed to cite any evidence disputing the facts. Waterworks also filed a separate statement of material facts in support of its opposition, which was supported by declarations of Mathias Toupin (Waterworks's president), Richard Carnation, and Eric Phillips (Waterworks's attorney), along with documents attached to the declarations. Federal objected to Waterworks's evidence.

On October 23, 2014, the court granted Federal's motion for summary adjudication of the City's cross-complaint in interpleader, and sustained Federal's objections to all of Waterworks's evidence. The court ruled that Waterworks's cause of action for enforcement of the stop notice was time-barred and ordered it dismissed with prejudice. The court further ordered that Waterworks's claim of entitlement to the interpled funds failed as a matter of law, whereas Federal had established its claim of entitlement to the interpled funds. The court therefore ordered the City to release the interpled funds amounting to \$867,193.20 to Federal.

The court explained in its order granting summary adjudication that, based on the recording of the notice of completion on January 18, 2012, all stop notices were required to be filed by February 18, 2012, and any action to enforce them had to be filed by May 18, 2012, under sections 3184, subdivision (a) and 3210. Because Waterworks did not file its action until January 17, 2013, the court concluded that Waterworks's claim to the interpled funds was time-barred. The trial court noted that Waterworks did not object to any of Federal's evidence and did not offer any admissible evidence refuting Federal's undisputed material facts.

The trial court further stated in its order that it rejected Waterworks's argument that triable issues existed based on the partial settlement agreement. The trial court explained that Waterworks entered into the partial settlement agreement on June 27, 2012, after its rights to enforce the stop notice expired. In addition, the court found that

the partial settlement agreement did not toll or extend the time to file Waterworks's claims.

B. Standard of Review

“Summary adjudication is proper if the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to prevail on a cause of action as a matter of law. [Citations.] A defendant moving for summary adjudication bears the initial burden to show the cause of action has no merit, i.e., ‘that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.’ (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant meets this burden, ‘the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists’” (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1386-1387.)

“We review a summary adjudication order de novo. [Citation.] We strictly construe the moving party's evidence and liberally construe the evidence favoring the party opposing the motion. [Citation.] We resolve all doubts in favor of the opposing party. [Citation.] We affirm an order granting summary adjudication if it is legally correct on any ground raised in the trial court proceedings.” (*Kight v. CashCall, Inc.*, *supra*, 200 Cal.App.4th at p. 1387.)

C. Discussion

Federal met its initial burden of proof by establishing that Federal had a valid right to recover the interpled funds, and Waterworks's stop notice claim to the funds (cause of

action D) was time-barred. Federal's supporting evidence established undisputed material facts concerning the recordation of the notice of completion, the filing date of Waterworks's action, and the trial court's ruling sustaining Federal's demurrer to Waterworks's claims for enforcement of the stop notice and payment bond. Such evidence included the general indemnity agreements between Federal and ASR, the payment bonds issued on behalf of ASR, the indemnity agreements Federal filed with the California Secretary of State as UCC-1 and UCC-3 financing statements, and ASR's voluntary default and assignment of all of its public works project funds to Federal. Waterworks failed to submit any admissible evidence refuting Federal's statement of supporting material facts. As to most all of the facts, Waterworks stated in its response that they were either conceded or not disputed. As to the few additional facts, Waterworks did not cite any refuting evidence.

Waterworks attempted to raise disputed material facts by filing a separate statement of material facts in support of its arguments that (1) Waterworks's stop notice claim was not time-barred and (2) Federal never acquired an enforceable right to collect the Project funds from ASR. As to the latter point, Waterworks reasoned that Federal's rights to the funds were derivative of ASR's rights and ASR was barred from recovery of the funds under Business and Professions Code section 7031, because ASR was not duly licensed as a contractor at all times during the Project.

(1) Waterworks's Forfeiture of Evidentiary Objections

Federal argues, as a threshold matter, that Waterworks forfeited any challenge to the trial court's summary adjudication order sustaining Federal's objections to Waterworks's evidence, because Waterworks failed to affirmatively challenge the trial court's evidentiary rulings in Waterworks's appellate opening brief. We agree. Waterworks has not raised on appeal any objection to the trial court's ruling sustaining Federal's objections to all of Waterworks's evidence submitted in support of its summary adjudication opposition, which included declarations by Phillips, Carnation, and Toupin, along with documents attached to the declarations. Any challenge to the trial court ruling sustaining Federal's evidentiary objections therefore has been forfeited. (*Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at p. 956.)

As a consequence of exclusion of Waterworks's evidence, Waterworks failed to present any admissible evidence in opposition to Federal's motion for summary adjudication. The only evidence properly considered by the trial court when deciding the summary adjudication motion was evidence submitted by Federal in support of the motion. Federal thus met its burden of establishing that Waterworks's stop notice claim was time-barred and Federal had perfected its rights to the City's interpleaded funds. We further conclude Waterworks failed to cite any evidence in opposition, raising a material triable issue of fact.

(2) Waterworks's Stop Notice Claim Was Time-barred

As to summary adjudication of the issue of whether Waterworks's claim for enforcement of the stop notice was time-barred, the trial court previously decided the issue when it sustained without leave to amend Federal's demurrer to Waterworks's causes of action for enforcement of the stop notice and payment bond. Furthermore, Waterworks's opposition to Federal's summary adjudication motion failed to present any admissible evidence or establish as a matter of law any basis for ruling contrary to the trial court's previous determination that Waterworks's stop notice claim was time-barred.

(3) Waterworks's Licensure Argument Lacks Merit

We also reject Waterworks's licensure argument for the same reasons stated by the trial court in its summary adjudication order. Waterworks argued that Federal's rights were derivative of ASR's. Therefore, under Business and Professions Code section 7031,¹⁰ ASR was barred from bringing a payment claim or suit, because ASR's license was temporarily suspended during the Project for nine days, from June 19, 2011, to June 28, 2011. Waterworks thus concluded that, because Federal's right to collect the interpled funds was derivative of ASR's right, Federal was also barred from collecting the interpled funds.

¹⁰ Business and Professions Code section 7031, subdivisions (a) and (b) provide:
“(a) Except as provided in subdivision (e) [the contractor has never been a duly licensed contractor in this state], no person *engaged in the business or acting in the capacity of a contractor*, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance

Under Business and Professions Code section 7031, subdivision (b), only the City was entitled to remedies available based on ASR's lack of a license. Section 7031, subdivision (b) provides, in relevant part, that a person or entity, which utilizes the services of an unlicensed contractor may bring a lawsuit to recover all compensation the City paid to the unlicensed contractor (ASR) for performance of any act or contract. Here, the City engaged the services of ASR, which was unlicensed for nine days during the Project. By interpleading the Project funds, the City admitted the funds were owed to ASR and its subcontractors and suppliers, and thus waived the right to assert ASR was not properly licensed. As correctly noted by the trial court, Waterworks provided no persuasive authority for the proposition that Waterworks, a subcontractor, had standing to assert that ASR was unlicensed.

Furthermore, Waterworks failed to provide any admissible evidence that ASR was not licensed or that ASR did not substantially comply with licensure requirements. Under Business and Professions Code section 7031, subdivision (e), "the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor

of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

"(b) Except as provided in subdivision (e), *a person who utilizes the services of an unlicensed contractor* may bring an action in any court of competent jurisdiction in this state to recover all *compensation paid to the unlicensed contractor* for performance of any act or contract." (Italics added.)

in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.”

(4) Federal’s Rights Were Not Derivative of ASR’s Rights

Federal’s right to collect the interpled funds was not derivative of ASR’s rights. Federal was entitled to collect the interpled funds as a secured creditor, not as a contractor. Waterworks provided no authority supporting the proposition a secured creditor must establish licensure of the debtor (ASR) in order to recover on that debt from a third party (the City) who has admitted the debt is owed. A surety, such as Federal, has obligations on its guaranty that are separate and independent from those created by the principal debt. (*United Central Bank v. Superior Court* (2009) 179 Cal.App.4th 212, 215.)

A surety on a public works payment bond provides materialmen and subcontractors with a means of recovery that is separate and distinct from any action based on the acts or omissions of the general contractor, i.e., the principal (ASR). (*California Electric Supply Co. v. United Pacific Life Ins. Co.* (1964) 227 Cal.App.2d 138, 149; *Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 355.) Because the interpretation and effect of such a bond are determined by the public works payment bond statutes (*Myers v. Alta Constr. Co.* (1978) 37 Cal.2d 739, 742), the bond establishes statutory entitlements and obligations by the surety independent of the

principal's (ASR's) public works contracts (*Powers Regulator Co.*, *supra*, at p. 345; *Fidelity Roof Co.*, *supra*, 60 Cal.App.4th at p. 423). The surety, Federal, therefore is entitled to be indemnified by the principal, ASR (§§ 2819, 2824; *Pacific Indem. Co. v. Harper* (1939) 14 Cal.2d 379, 384-385). Federal's remedies against the principal, ASR, could not be impaired by ASR's creditors, such as Waterworks. (*Bennett v. Leatherby* (1992) 3 Cal.App.4th 449, 452.)

Here, ASR agreed to indemnify Federal as a precondition to Federal issuing a statutory payment bond. In order to perfect its security interest, Federal filed ASR's indemnity agreements with the California Secretary of State as UCC-1 and UCC-3 financial statements. It is undisputed that Federal obtained from ASR a voluntary default and assignment of all public works funds. In addition, neither the City nor ASR asserted an interest in the interpled funds, and Waterworks's stop notice claim to the funds was time-barred.

These undisputed material facts establish that Federal was entitled to the interpled funds as a surety on the Project and as ASR's secured creditor, regardless of ASR's nine-day licensure lapse. Even assuming ASR's licensure lapse during the project led to ASR lacking standing to challenge Waterworks's stop notice claim and collect the interpled funds, this has no bearing on Federal's independent claim and standing to recover the interpled funds, as a surety and secured creditor. (*Fidelity Roof Co.*, *supra*, 60 Cal.App.4th at p. 423.)

Waterworks cites *Shields v. Shoaff* (1953) 116 Cal.App.2d 306, 308, for the

proposition that an assignee of a building contractor's contractual rights to payment cannot recover based on those rights if the assignor contractor did not possess a valid general contractor's license. Waterworks argues that once the contractor loses its right to payment under Business and Professions Code section 7031, because the contractor did not possess a valid general contractors license, the contractor cannot resurrect its contract rights by assigning or transferring them to a third party.

Shields v. Shoaff, supra, 116 Cal.App.2d 306 is distinguishable because the contractor in *Shields* did not have a license at the time the construction contract was executed or any time thereafter. In addition, in *Shields*, the plaintiff seeking to recover payment was not a surety acting under a statutory payment bond, with all the independent rights and duties the bond entailed. The *Shields* plaintiff, doing business as a collection service, was an assignee of a promissory note, and was suing the maker of the note given to the contractor as final payment under the construction contract.

Waterworks's reliance on *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141 is also misplaced. Waterworks cites *Lewis* for the proposition licensure can be challenged at any time, and a subcontractor has standing to assert recovery and is protected by California's licensing statutes, including Business and Professions Code section 7013, subdivision (a). In *Lewis & Queen*, the court found that the plaintiff, a subcontractor, had acted as a contractor without a required license, and therefore, under Business and Professions Code section 7031, could not maintain an action against the contractor or sureties on its bonds. (*Lewis & Queen, supra*, at pp. 153-154.) *Lewis &*

Queen is distinguishable because it involved an unlicensed subcontractor, which had acted as a contractor without a license and was suing for collection of compensation on bonds and stop notices posted by a licensed general contractor. (*Id.* at pp. 144-145.)

The court in *Lewis* held that a subcontractor, acting as an unlicensed contractor, “is not to be protected from his own unlicensed activities. To allow him to recover would in fact destroy the protection of those who dealt with him, and they are in the class the Legislature intended to protect whether they are owners or general contractors.” (*Lewis & Queen v. N. M. Ball Sons, supra*, 48 Cal.2d at p. 153.) The instant case does not involve a subcontractor acting as a contractor without a license, suing to recover compensation for services. Furthermore, ASR was licensed during most of the project, and Federal is not asserting lack of licensure as a defense. In addition, as explained above, the issue of ASR’s licensure is not determinative of or relevant to Federal’s claim to the interpled funds.

It is undisputed that Federal had a valid claim of right to the City’s interpled funds regardless of ASR’s lapse in licensure. Waterworks thus failed to raise any disputed triable issues of material fact refuting Federal’s claim to the interpled funds. Therefore, the trial court did not err in granting Federal’s motion for summary adjudication, in which the court ruled that Waterworks’s stop notice claim to the interpled funds was time-barred and Federal was entitled to receive the interpled funds.

VII.

ATTORNEY FEES AND COSTS

Waterworks concedes that, if this court holds that the trial court did not err in sustaining Federal's demurrer to Waterworks's payment bond cause of action, the trial court, did not err in awarding Federal its attorney fees and costs as the prevailing party. Accordingly, because we conclude, as discussed above, that the trial court properly sustained Federal's demurrer to the second amended complaint, we find no error in the trial court awarding Federal its attorney fees and costs as the prevailing party on its demurrer to the cause of action for enforcement of the payment bond.

VIII.

DISPOSITION

The judgment is affirmed. Federal is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.